trespasser with his feet upon the springboard, and when he is immersed in the public river immediately below, or is even clutching the board with his hands, or when he is a few inches in space above it, jumping through the air. "Rights and duties in systems of living law," he says, "are not built upon such quicksands." [10]

Now this smacks strongly of the capricious personal brand of justice dispensed by an Oriental monarch, and therein lies its danger. But somewhat of this discretionary element must be injected into our jurisprudence if we are to escape an absolutely mechanical system of law. For no matter how wide or how narrow we make our categories, there will always be borderline cases which fit into more than one of them.[11] It is here that set rules must be abandoned and resort must be had to the fundamental interests that lie behind them. It is in weighing and balancing these interests that the discretionary element must enter. When rules conflict and collide, judges must have regard for "the human conditions they are to govern."

The decision in this case does not establish any new principle in the law of torts. In future citations it will probably be resolved upon either of the first two points mentioned in analyzing it. But it does represent a distinctly new spirit in judicial method — a spirit which will refuse to uphold abstract categories and formal deductions to the detriment of individual and social interests; a spirit which will "relegate logic to its true position as an instrument."

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EXCISES AS PROPERTY TAXES.— Many state constitutions provide that all property shall be taxed uniformly in proportion to value.[1] These provisions are often held to prevent even a difference in the rate of taxation between realty and personalty,[2] and certainly do not allow a single article to be selected for a general tax at a higher rate.[3] At the same time, practical considerations make it desirable that property taxes

[10] See Hynes *v.* New York Central R. R. Co., *supra*, note 4, at p. 899.

[11] Judge Cardozo's opinion concludes: "There are times when there is little trouble in marking off the field of exemption and immunity from that of liability and duty. Here structures and ways are so united and commingled, superimposed upon each other, that the fields are brought together. In such circumstances there is little help in pursuing general maxims to ultimate conclusions. They have been framed *alio intuito*. They must be reformulated and readapted to meet exceptional conditions. Rules appropriate to spheres which are conceived of as separate and distinct cannot be enforced when the spheres become concentric. There must be readjustment or collision. In one sense, and that a highly technical and artificial one, the diver at the end of the springboard is an intruder on the adjoining lands. In another sense, and one that realists will accept more readily, he is still in public waters in the exercise of public rights. The law must say whether it will subject him to the rule of one field or of the other, of this sphere or of that. We think that considerations of analogy, of convenience, of policy, and of justice, exclude him from the field of the defendant's immunity and exemption and place him in the field of liability and duty." Hynes *v.* New York Central R. R. Co., *supra*, note 4, at p. 900.

[1] See 1 COOLEY, TAXATION, 3 ed., 274; JUDSON, TAXATION, 2 ed., § 503, and pp. 769 *et seq.*

[2] Savannah *v.* Weed, 84 Ga. 683, 11 S. E. 235 (1890). See First National Bank *v.* Holmes, 246 Ill. 362, 369, 92 N. E. 893, 895 (1910).

[3] Thompson *v.* Kreutzer, 112 Miss. 165, 72 So. 891 (1916); State *v.* Cumberland & Pennsylvania R. R. Co., 40 Md. 22 (1873).

should not be universal in scope.[4] The constitutional provisions referred to do not prevent the imposition of excise taxes upon selected classes of persons.[5] It is therefore not surprising to find efforts, more or less unconscious, to effect what is in substance a property tax in the guise of an excise.[6]

A property tax is one imposed periodically upon the property itself. Its true nature is shown by the fact that it can be imposed upon property belonging to non-residents,[7] although mere ownership of property within a sovereign's jurisdiction gives no personal jurisdiction.[8] On the other hand an excise is a personal tax imposed for any act, or exercise of a privilege, or occupation. It would seem to follow that a different rate of taxation could be imposed upon different property merely by making the tax a personal one graduated upon the amount of a certain sort of property owned, as, for example, a tax upon the privilege of ownership. But it is generally agreed that the constitutional provisions apply not only to property taxes which are called such, but also to purported excises whose effect in substance is to tax the property.

A tax on property is necessarily a charge upon the assets of the owner at the time assessment is made, and not a charge upon the assets of any one else at that time. In other words, the effect of an admitted property tax as to a particular individual is that it is certain to be imposed if he owns property when the assessment is made, and certain not to be imposed if he does not then own the property. A personal tax which has a similar effect is clearly in substance a property tax. Thus a tax levied upon the occupation of owning particular kinds of land is unconstitutional.[9] And the same is true of a tax upon the privilege merely of keeping a certain sort of property.[10] Conversely, if the tax is sure to be imposed upon a particular person although the property on which it is claimed

[4] See WELLS, THEORY AND PRACTICE OF TAXATION, 628; NEW YORK COMMISSIONERS TO REVISE TAXES, SECOND REPORT, 9 *et seq.*

[5] State *v.* Guilbert, 70 Ohio St. 229, 71 N. E. 636 (1904); Salt Lake City *v.* Christenson Co., 34 Utah, 38, 95 Pac. 523 (1908); Glasgow *v.* Rowse, 43 Mo. 479 (1869).

[6] The Federal courts follow the decisions of the local courts. Dawson *v.* Kentucky Distilleries Co., 41 Sup. Ct. 272 (1921); Brown-Forman Co. *v.* Kentucky, 217 U. S. 563 (1910).

[7] Mills *v.* Thornton, 26 Ill. 300 (1861); People *ex rel.* Cook *v.* Dunckel, 69 Misc. 361, 125 N. Y. Supp. 385 (1910). See Joseph H. Beale, "Jurisdiction to Tax," 32 HARV. L. REV. 587, 593. In such cases the enforcement of the tax must be *in rem.* Dewey *v.* Des Moines, 173 U. S. 193 (1899); Matter of Maltbie *v.* Lopsitz Mills Co., 223 N. Y. 227, 119 N. E. 388 (1918).

[8] Pennoyer *v.* Neff, 95 U. S. 714 (1877).

[9] Thompson *v.* Kreutzer, 112 Miss. 165, 72 So. 891 (1916). *Contra*, Producers' Oil Co. *v.* Stephens, 44 Tex. Civ. App. 327, 99 S. W. 157 (1907). In an early case the United States Supreme Court held that a Federal tax upon the keeping of pleasure carriages was not a "direct" tax. Hylton *v.* United States, 3 Dall. (U. S.) 171 (1796). The decision might be rested on the ground that at that time it was thought that only taxes on land, and capitation taxes, were "direct." See Hamilton's argument, 8 HAMILTON, WORKS, Lodge ed., 378. But the same court has now held that a Federal tax upon personalty must be apportioned. Pierce *v.* United States, 232 U. S. 290 (1914). Any decision that a Federal tax does not constitute a "direct" tax must therefore be regarded as an authority that it is not a property tax. On this ground it was held that a Federal tax upon the use of yachts could not be imposed upon one whose use consisted only in ownership. Pierce *v.* United States, *supra*, reversing United States *v.* Billings, 190 Fed. 359 (S. D. N. Y. 1911).

[10] Johnston *v.* Macon, 62 Ga. 645 (1879).

to be laid is no longer his, it is clearly an excise. A transfer or sales tax is therefore, in substance as well as form, an excise tax.[11]

Logically, a tax which does not come within the above classification may or may not be substantially a property tax. The line seems to be drawn by considering a tax as on property when its payment is a prerequisite of making any possible use, but not otherwise. In the borderline cases, it will take the form of taxing either an occupation as such, or a use as such. In operation every tax on an occupation involves taxing some use of property, and often of taxing the only practical use. A tax on the occupation of manufacturing is an excise,[12] but machinery could be used for little else. This result must be sustained; such a tax has always been considered a typical excise. No constitutional provision could ever have been intended to prohibit such a tax. Indeed, many constitutions provide explicitly for a tax upon occupations.[13]

The same principles apply to the taxation of a use as such. Beneficial use may be practically prohibited by a valid excise.[14] Despite judicial statements to the contrary,[15] it seems that even one so fundamental as that of deriving income may be taxed without taxing the property from which the income is derived.[16] This follows from the fact that income from foreign property may be taxed,[17] since it is clear that a sovereign cannot impose a property tax on property beyond the jurisdiction.[18] If, however, the tax statute means an absolute prohibition of use unless the tax is paid, the limit is considered reached. Thus a tax upon the gross

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[11] Thomas *v.* United States, 192 U. S. 363 (1903); People *ex rel.* Hatch *v.* Reardon, 184 N. Y. 431, 77 N. E. 970 (1906), aff'd Hatch *v.* Reardon, 204 U. S. 152 (1907); Kurth *v.* State, 86 Tenn. 134, 5 S. W. 593 (1887). But see Livingston *v.* Albany, 41 Ga. 21 (1870).

[12] Strater Bros. Tobacco Co. *v.* Commonwealth, 117 Ky. 604, 78 S. W. 871 (1904); Spreckles Sugar Refining Co. *v.* McLain, 109 Fed. 76 (E. D. Pa., 1901), reversed (on another point) 192 U. S. 397 (1901). There are a great number of cases sustaining, as excises, taxes on the use of property. See Atlanta National Association *v.* Stewart, 109 Ga. 80, 35 S. E. 73 (1900); Newton *v.* Atchison, 31 Kan. 151, 1 Pac. 288 (1883); Clark *v.* Titusville, 184 U. S. 329 (1902). The limits of an occupation may be fixed by the aggregate amount of business done. Commonwealth *v.* Hazel, 155 Ky. 30, 159 S. W. 673 (1913).

[13] See, *e.g.*, CONSTITUTION, KENTUCKY, § 181. The occupation must be for profit to be taxable as such. Tarde *v.* Benseman, 31 Tex. 277 (1868).

[14] Driving automobile on public way: Kane *v.* State, 81 N. J. L. 594, 80 Atl. 453 (1911); Commonwealth *v.* Boyd, 188 Mass. 79, 74 N. E. 255 (1905); Terre Haute *v.* Kersey, 159 Ind. 300, 64 N. E. 469 (1902). Keeping dogs: Longyear *v.* Buck, 83 Mich. 236, 47 N. W. 234 (1890); Mowery *v.* Salisbury, 82 N. C. 175 (1880).

[15] See Pollock *v.* Farmers' Loan & Trust Co., 157 U. S. 429, 581 (1895); Opinion of the Justices, 220 Mass. 613, 624, 108 N. E. 570, 574 (1915).

[16] An income tax is in reality a property tax upon the income, as is shown by the fact that a state can tax the income received from land within its jurisdiction but belonging to non-residents. Shaffer *v.* Carter, 252 U. S. 37 (1920); Travis *v.* Yale & Towne Mfg. Co., 252 U. S. 60 (1920). But it is clear that its imposition in effect taxes the particular use of deriving income from the property.

[17] See Maguire *v.* Trefry, 253 U. S. 12 (1920). All income tax statutes include income from foreign lands. See 1919, BARNES, FEDERAL CODE, § 5514; BLACK, INCOME TAXES, 2 ed., pp. 643 *et seq.* Yet these provisions appear never to have been questioned.

[18] See State Tax on Foreign-held Bonds, 15 Wall. (U. S.) 300, 319 (1872); Louisville & Jeffersonville Ferry Co. *v.* Kentucky, 188 U. S. 385 (1903); Union Refrigerator Transit Co. *v.* Kentucky, 199 U. S. 194 (1905). See 1 WHARTON, CONFLICT OF LAWS, 3 ed., § 80 a.

value of the production of mineral lands cannot be sustained as an excise tax.[19] Moreover, calling the tax one upon an occupation cannot change its character if the effect is to produce the result just described.[20]

The same question is raised in a recent Kentucky case, where a tax upon the occupation of removing spirits from bond was held unconstitutional when levied upon an owner.[21] Whiskey while it remains in bond is as little capable of use as unmined minerals; so the decision is in accord with the previous authority. It seems difficult to find a rational distinction between taxation of every speculatively possible use, and of nearly every beneficial use. No court has attempted an explanation. Probably all that can be said is that taxation of the latter is an excise *ex vi termini*, while the former appears to come so close to taxing mere ownership that it can be considered as nothing else.

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DISCRETION IN *QUO WARRANTO* AGAINST A PUBLIC CORPORATION.—*Quo Warranto* is the appropriate mode of inquiry by what right a body of individuals or an alleged corporation[1] exercises the functions and franchises of a municipal or other public corporation;[2] or of testing the right of an individual to hold office in such a corporation.[3] The normal result of a finding that such franchises have been usurped is a judgment of ouster,[4] terminating at once the activities of the *de facto*[5] officer or corporation.[6] Occasionally, however, a municipality technically void has existed so long and under such circumstances that the public good is better served by the uninterrupted user of the usurped franchises

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[19] Large Oil Co. *v.* Howard. 63 Okla. 143, 163 Pac. 537 (1917). *Contra*, Raydure *v.* Board of Supervisors, 183 Ky. 84, 99, 209 S. W. 19, 26 (1919). Bnt see State *v.* Cumberland & Pennsylvania R. R. Co., 40 Md. 22 (1873).

[20] Thompson *v.* McLeod, 112 Miss. 383, 73 So. 193 (1916).

[21] Craig *v.* E. H. Taylor, Jr., & Sons, 232 S. W. 395 (Ky.). For the facts of this case see RECENT CASES, *infra*, p. 94. The United States Supreme Court had previously reached the same result, as a matter of Kentucky law. Dawson *v.* Kentucky Distilleries Co., 41 Sup. Ct. 272 (1921). If there had been an occupation of attending to the formalities of taking spirits out of bond for owners it would seem to be a valid tax.

[1] That the corporation *de facto* is the proper party defendant: State *v.* Leischer, 117 Wis. 475, 94 N. W. 299 (1903); State *v.* Atlantic Highlands, 50 N. J. L. 457 (1888). *Contra:* State *v.* Small, 131 Mo. App. 470, 109 S. W. 1079 (1908).

[2] State *v.* City of Birmingham, 160 Ala. 196, 48 So. 843 (1909); State *v.* Atlantic Highlands, *supra;* State *v.* Bradford, 32 Vt. 50 (1859). See HIGH, EXTRAORDINARY LEGAL REMEDIES, 3 ed., 641; 2 DILLON, MUNICIPAL CORPORATIONS, 4 ed., § 890; also cases in note 12, *infra*.

[3] Darley *v.* Queen, 12 Cl. & F. 520 (1845); Comm. *v.* Allen, 128 Mass. 308 (1880). Occasionally this is made the method of an indirect attack upon the validity of the municipality itself. State *v.* Leischer, *supra*. But when at the instance of a private relator under the Statute of Anne, it is restricted by the court's power in its sound discretion to refuse to allow the information to be filed. King *v.* Trevenen, 2 B. & Ald. 479 (1819). See also note 9, *infra*.

[4] State *v.* Bradford, *supra*. And see State *v.* Woods, 233 Mo. 357, 135 S. W. 932 (1911), where judgment of ouster issued as of course.

[5] The American doctrine seems to be that a *de jure* municipal corporation can be extinguished only by legislative enactment. See HIGH, EXTRAORDINARY LEGAL REMEDIES, 3 ed., 637; Cain *v.* Brown, 111 Mich. 657, 70 N. W. 337 (1897).

[6] See HIGH, *op. cit.*, 697, 701.